FILED
MAY 21 2007

(3)

No. 06-1073

IN THE

Supreme Court of the United States

KATHY BLIESNER,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA,
AND VERIZON NORTHWEST, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE UNION RESPONDENT

RICHARD ROSENBLATT
8085 East Prentice Avenue
Greenwood Village, CO 80111

JAMES B. COPPESS
Counsel of Record
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Page

Breininger v. Sheet Metal Workers, 493 U.S. 67 (1989) 5, 9, 10
Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238 (7th Cir. 1997) 8
DelCostello v. Teamsters, 462 U.S. 151 (1983) 4, 6
Mulvihill v. Top-Flite Golf Co., 335 F.3d 15 (1st Cir. 2003) 7
Talbot v. Matthews Distrib. Co., 961 F.2d 654 (7th Cir. 1992) 7
Teamsters Local 391 v. Terry, 494 U.S. 558 (1990) 4, 6, 10
Thompson v. Aluminum Company of America, 276 F.3d 651 (4th Cir. 2002) 5, 7, 8, 9
White v. Anchor Motor Freight, Inc., 899 F.2d 555 (6th Cir. 1990) 7

STATUTE

29 U.S.C. § 185 5

IN THE

Supreme Court of the United States

No. 06-1073

KATHY BLIESNER,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, AND VERIZON NORTHWEST, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE UNION RESPONDENT

Respondent Communications Workers of America, AFL-CIO, submits this brief in opposition to the petition for certiorari.

STATEMENT

The instant case arises out of an unsuccessful attempt by the Petitioner, Kathy Bliesner, to displace a junior co-worker in order to avoid being laid-off from employment at Verizon Northwest, Inc. Pet. App. 2a. The collective bargaining agreement between Verizon and the Communications Workers of America ("CWA") would have allowed Petitioner to displace the junior employee if, but only if, the Petitioner possessed the

qualifications to perform the junior employee's job or could acquire those qualifications with one week of training. *Ibid.* Verizon determined that the Petitioner neither possessed the necessary qualifications nor could acquire those qualifications with one week's training and therefore denied her request to bump the junior employee. *Id.* at 3a-4a.

CWA filed a grievance on Petitioner's behalf. Pet. App. 4a. The third and final pre-arbitration step of the grievance procedure was completed in March 1996. *Ibid.* CWA Local 7670 handled the grievance through the first three steps of the procedure; thereafter the grievance was handled by a representative of the CWA national union. Ninth Circuit Excerpts of Record 51.

In order to meet the contractual time limits, the national CWA representative requested arbitration in April 1996 without first investigating the merits of the grievance. Ninth Circuit Excerpts of Record 51. Upon later investigating the merits of the grievance, the national CWA representative determined that the grievance would not be sustained at arbitration. *Id.* at 52-53. After making a number of unsuccessful attempts to settle the grievance, the national CWA representative informed the Petitioner of his decision not to take the grievance to arbitration. *Ibid.* Petitioner exercised her right as a CWA member to appeal that decision within the Union, and at the final step of the appeal procedure it was decided that the Union would continue to process the grievance to arbitration. *Ibid.*

At the arbitration hearing, Verizon took the position that CWA had not requested arbitration in a timely fashion. Ninth Circuit Excerpts of Record 34, 44-45, 970. Based on his assessment that the Company had failed to adequately prove its timeliness defense, the attorney representing CWA at the arbitration made a tactical decision not to put on any evidence concerning that issue. *Id.* 954-955, 971. However, the arbitrator found that the Union had not processed the grievance to arbitration until March 2001 and on that basis dismissed the

grievance as untimely. *Id.* 286. The Union filed two unsuccessful motions requesting the arbitrator to reconsider his decision on the ground that the Company had not adequately proven its timeliness defense. Pet. App. 5a & n. 2.

The Petitioner thereafter brought suit alleging that Verizon had breached the collective bargaining agreement by denying her request to bump the junior employee and that CWA had breached its duty of fair representation in handling her grievance. Pet. App. 5a.

It was undisputed that the Petitioner lacked the following qualifications for the job she sought:

> "she had no training or experience of any kind in MARK and SODA systems, the processing of expense vouchers, updating EIR's and performance reviews" and "she had limited experience with Lotus 1-2-3, had not used telemail, she was unfamiliar with the basic functions of SES, [had] limited experience with WordPerfect, she had not generated different kinds of company correspondence since the 1980s, she had no experience handling absence control procedures and she had no experience processing Family Medical Leave Act requests." Pet. App. 11a (quotation marks and footnote omitted).

The only dispute concerned whether one week of training could remedy these deficiencies. As to the disputed training issue, the Company presented an affidavit stating:

> "the training time for SODA is a one-day basic training class. The training time for a working knowledge of the MARK systems is a formal class that lasts 3 to 4 weeks and such skills are essential for the Moscow position. The training time for learning the system to pay bills and process expense vouchers is a few weeks." Pet. App. 11a.

In response, the Petitioner submitted an affidavit that asserted generally "the skills necessary to perform said tasks could easily be learned by me in one week or less." *Ibid.*

The district court concluded that "Ms. Bliesner's statements that she could have been trained in one week or less are conclusory, self-serving and do not create a material issue of genuine fact to survive summary judgment." Pet. App. 12a. "Because the applicable language of the union contract [wa]s unambiguous and the evidence . . . [wa]s undisputed that Ms. Bliesner could not have been trained for the position she was requesting to bump into within one-week, the Court f[ound] there [wa]s no genuine issue of material fact regarding the alleged violation of the CBA by Verizon" and that "Verizon did not violate the CBA." *Id.* at 13a-14a.

Having found that the Petitioner "failed to survive summary judgment as to her claim against Verizon," the court found that "her claim against the union also fails." Pet. App. 14a. The court concluded that it "need not address the union's alleged failure to timely process the request to arbitrate as there is no merit [to] Plaintiff's underlying claim of being improperly denied her request to bump." *Ibid.*

The Petitioner appealed the district court's grant of summary judgment principally on the ground "that the district court erred by deciding that Verizon did not breach the CBA without first deciding whether CWA breached its duty of fair representation." Pet. App. 29a. The court of appeals concluded that "nothing requires the district court to decide the fair representation question first" and that "[d]eciding the CBA question first is . . . a normal and entirely sensible procedure frequently followed by a court confronted with two potentially dispositive questions, one of which is easier to resolve." *Id.* at 29a-30a.

ARGUMENT

The Ninth Circuit decision below follows directly from the principles stated by this Court in *DelCostello v. Teamsters*, 462 U.S. 151, 164-165 (1983), and *Teamsters Local 391 v. Terry*, 494 U.S. 558, 564 (1990), and is in accord with the First, Sixth and Seventh Circuits' application of the teachings of

DelCostello and *Terry* to cases like this one. The Petitioner's claim that the decisions of these circuits conflict with the Fourth Circuit's decision in *Thompson v. Aluminum Company of America*, 276 F.3d 651 (2002), Pet. 7-8, is entirely without substance: *Thompson* did not present the same issue as this case and the *Thompson* opinion, in treating with the issue presented there, endorsed the approach followed by the Ninth Circuit in deciding this case and by the First, Sixth and Seventh Circuits in deciding cases identical to this one. The Petitioner's claim that the decisions below conflict with *Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989), Pet. 8-9, is equally without substance as *Breininger* addresses an entirely different question.[1]

1. Section 301 of the Labor Management Relations Act of 1947 provides for "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185. Suits, such as that brought by the Petitioner, alleging that an employer has breached its collective bargaining agreement and that a union has breached its duty of fair representation in seeking to redress the employer's breach through the contractual grievance-arbitration procedures are known as "hybrid § 301/fair representation suits." Pet. App. 8a.

This Court has described the nature of a hybrid § 301/fair representation suit as follows:

> "Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent.

---

[1] Because the petition for certiorari does not even pretend that the third and fourth questions presented are independently worthy of review in this Court, Pet. 9-10, we address only the first two questions presented.

> To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello v. Teamsters*, 462 U.S. 151, 164-165 (1983) (ellipses, brackets, quotation marks, citations and footnote omitted).

In *Teamsters Local 391 v. Terry*, 494 U.S. 558, 564 (1990), the Court relied upon the above passage from *DelCostello* in describing what a plaintiff must prove in order to prevail in a hybrid § 301/fair representation suit:

> "Whether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation."[2]

Applying the teaching of *DelCostello* and *Terry* that the same two facts must be proved to recover against either the employer or the union in a hybrid § 301/fair representation suit, every court of appeals decision to have addressed the issue holds that it is proper for a district court to dismiss such suits upon determining that the employer's action did not violate the terms

---

[2] The *Terry* Court relied on the fact that an employee bringing a hybrid § 301/fair representation suit must prove both an employer contract breach and a union fair representation breach in holding that "an employee who seeks relief in the form of backpay for a union's alleged breach of its duty of fair representation has a right to trial by jury." *Id.* at 561. The fact that both breaches have to be shown was relevant to the jury trial issue, because "[w]hen viewed in isolation, the duty of fair representation issue is analogous to a claim against a trustee for breach of fiduciary duty" as to which there is no Seventh Amendment right to a trial by jury but "[t]he § 301 issue . . . is comparable to a breach of contract claim—a legal issue" as to which there is a right to trial by jury. *Id.* at 569-570.

of the collective bargaining agreement and without determining whether the union breached its duty of fair representation. *See Mulvihill v. Top-Flite Golf Co.*, 335 F.3d 15, 27 (1st Cir. 2003) ("Our conclusion that Spalding did not breach the CBA when it terminated Mulvihill's employment serves to dispose of his case against the Union as well."); *Talbot v. Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir. 1992) ("Because the plaintiffs failed to prove an essential element of their hybrid claim [i.e., that the employer "breached its collective bargaining agreement"], the district court [correctly] found it unnecessary to determine whether the Union breached its duty of fair representation in grieving the plaintiffs' breach of contract claim."); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) ("[I]f the first claim anchored in the employer's alleged breach of the collective bargaining agreement fails, then the breach of duty of fair representation claim against the union must necessarily fail with it.").

As the court of appeals observed, this approach is proper both as a matter of the governing substantive law and as a matter of sound judicial administration:

> "Evidently believing that the CBA § 301 question was easier to resolve, the district court held that Verizon had not violated the CBA. Having held that there was no violation of the CBA, the district court then granted summary judgment to both defendants on the ground that Bliesner had not prevailed on an essential element of her suit. Deciding the CBA question first is not merely permissible. It is also a normal and entirely sensible procedure frequently followed by a court confronted with two potentially dispositive questions, one of which is easier to resolve." Pet. App. 29a-30a.

2. *Thompson v. Aluminum Company of America*, 276 F.3d 651 (4th Cir. 2002), upon which the Petitioner principally relies, Pet. 7-8, is not in conflict with either the Ninth Circuit's

decision here or the decisions of the First, Sixth and Seventh Circuits.

In the first place, *Thompson* did *not* present the question of whether it is proper for a district court to dismiss a hybrid § 301/fair representation suit upon determining that the employer's action did not violate the terms of the collective bargaining agreement and without determining whether the union breached its duty of fair representation. The district court in *Thompson* determined *both* that the union had not breached its duty of fair representation *and* that the employer had not breached its collective bargaining agreement, and the Fourth Circuit expressly endorsed *both* of those determinations. 276 F.3d at 654 ("there is no evidence to support Thompson's claim against the Union for breach of its duty of fair representation") & 658 ("we agree with the district court's conclusion that Thompson cannot show Alcoa breached the collective bargaining agreement").

Beyond that, in deciding the issue presented in *Thompson*, the Fourth Circuit confirmed that a hybrid § 301/fair representation suit should be dismissed once a court determines that the plaintiff has failed to prove *either* of the two essential elements of a hybrid claim. The *Thompson* decision begins from the proposition that in "a so-called 'hybrid 301' action, . . . in order to prevail on the merits against either party, an employee must prove *both* 1) that the union breached its duty of fair representation and 2) that his employer violated the collective bargaining agreement." 276 F.3d at 656 (emphasis in original). Since the "claims against the Union and [the Employer] are 'interlocked[,] neither claim is viable if the other fails.'" *Id.* at 657, quoting *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1241 (7th Cir. 1997). And, it followed that the trial court's "conclusion that the Union did not breach its duty of fair representation resolve[d] the case for [the Employer] as well." *Id.* at 658.

In an effort to manufacture a circuit conflict out of *Thompson*, the Petitioner relies entirely on that opinion's explanation that a

court will generally "first address the claim against the Union, because federal courts review allegations against employers for breach of collective bargaining agreements *only* when an employee has first proved that the union representing breached its duty of fair representation." 276 F.3d at 657 (emphasis in original).[3] *See* Pet. 7. That explanation is far from a holding that the claim against the union *must always* be addressed first. Indeed, the *Thompson* opinion states that "where a court is well able to decide that the employee's contractual claim lacks merit as a matter of law, it is appropriate for the court to decide the case on that issue." *Id.* at 657 n. 7.

In context, then, what the Fourth Circuit clearly meant in the statement from *Thompson* relied upon by the Petitioner is that, where the contractual claim is not clearly meritless, the district court should first address whether there has been a fair representation breach in determining whether to dismiss a hybrid § 301/fair representation suit.

3. After unsuccessfully attempting to show a circuit conflict, the Petitioner goes on to claim that "the Ninth Circuit's decision [in this case] was in direct conflict with the prior decisions of this Court in *Breininger* and *DelCostello*." Pet. 8-9. That contention is no more substantial than the Petitioner's circuit conflict claim.

To begin, *Breininger* did *not* involve a hybrid § 301/fair representation claim at all. Rather, the issue in *Breininger* was whether "[t]he absence of a § 301 claim . . . requires that . . . the NLRB possesses exclusive jurisdiction over [a] fair representation suit." 493 U.S. at 82. While acknowledging that such a pure fair representation claim is "entirely different" than a

---

[3] That the *Thompson* court did not consider finding a union fair representation breach to be a jurisdictional prerequisite to considering the contract claim is demonstrated by the fact that the court went on to find the employee's contract claim meritless after first having determined that the union did not breach its fair representation duty. *Id.* at 658-659.

hybrid § 301/fair representation claim, the *Breininger* Court nevertheless held that "[f]ederal courts have jurisdiction to hear fair representation suits whether or not they are accompanied by claims against employers." *Id.* at 82-83. Thus, *Breininger* has nothing to do with what a plaintiff must prove in order to prevail in a hybrid § 301/fair representation case like this one or what issue a court must decide in order to dismiss such a case.

It is this Court's post-*Breininger* decision in Teamsters *Local 391 v. Terry, supra,* that defines what a plaintiff must prove in order to prevail in a hybrid § 301/fair representation suit. *Terry*, relying on *DelCostello*, holds that an employee must "prove *the same two facts* to recover" against either the union or the employer in a hybrid § 301/fair representation case: "that the employer's action violated the terms of the collective-bargaining agreement *and* that the union breached its duty of fair representation." 494 U.S. at 564 (emphasis added). The fact that *Terry* relied exclusively upon *DelCostello* as establishing this proposition belies the Petitioner's claim that the decisions below – which do nothing more than faithfully and sensibly apply this rule—conflict with *DelCostello.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD ROSENBLATT
8085 East Prentice Avenue
Greenwood Village, CO 80111

JAMES B. COPPESS
Counsel of Record
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337